

ENSURING CONTRACTUAL FAIRNESS IN CONSUMER CONTRACTS AFTER BARKHUIZEN V NAPIER 2007 5 SA 323 (CC) – PART 1

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1 Introduction

*Barkhuizen v Napier*¹ concerns a short-term insurance policy, concluded between the appellant (the insured) and a Lloyds syndicate (the insurer), represented by the respondent. The insured suffered loss resulting from damage to his 1999 BMW 328i on 2 December 1999. He duly claimed R181 000 representing the sum insured on the policy. On 7 January 2000 the respondent repudiated the claim on the basis that cover was provided for private use of the vehicle, but that the loss was suffered while it was being utilized for business purposes.² The insured only instituted action more than two years after repudiation, on 8 January 2002.

The summons was met with a special plea alleging that the insurer had been released from liability because of a time-limitation clause in the policy. The clause was to the effect that a claim of the insured would lapse if he failed to serve summons on the insurer within 90 days of being notified of the insurer's repudiation of the claim. The insured conceded non-compliance with the clause, but contended that the provision could not be enforced against him because it contravened the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The question was whether the court could impugn the time-limitation clause. The parties agreed to a terse statement of facts which set out this basic factual matrix.

Time-limitation or time-bar clauses have come before courts often enough. Technically, they are resolute conditions. They extinguish claims upon non-compliance.³ In some cases the courts have given effect to these clauses,⁴ while in others they interpreted time-bar provisions restrictively and have

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¹ 2007 5 SA 323 (CC)

² Paras 2, 182

³ Reinecke, Van der Merwe, Van Niekerk & Havenga *General Principles of Insurance Law* 2 ed (2002) para 318

⁴ *Bierman v Mutual & Federal Versekeringsmaatskappy Bpk* 2004 1 SA 205 (A); *Santam Insurance Ltd v Cave t/a The Entertainers and the Record Box* 1986 2 SA 48 (A); *Smit v Rondalia Versekeringskorporasie van Suid Afrika Bpk* 1964 3 SA 338 (A)

found them not to be applicable on the facts.⁵ For some years there have been rumblings that time-bar clauses could be unconstitutional,⁶ but the issue came before court for the first time in the *Napier* case.

The court of first instance, per De Villiers J, initially found in favour of the insured.⁷ The Supreme Court of Appeal overturned this decision in a unanimous judgment delivered by Cameron JA.⁸ Thereafter, Ngcobo J for the majority in the Constitutional Court (Madala J, Nkabinde J, Skweyiya J, Van der Westhuizen J and Yacoob J) upheld the decision of the Supreme Court of Appeal.⁹ Two separate concurring judgments were handed down by Langa CJ and O'Regan J, while two powerful dissenting judgments emanated from the pens of Moseneke DCJ (Mokgoro J concurring) and Sachs J.

2 The application of the Constitution to contracts and the law of contract according to Napier

The insured initially contended that the time-limitation provision was contrary to public policy as it prescribed an unreasonably short time for instituting action and was inconsistent with the right of the insured to seek the assistance of the court. Furthermore, the insured relied directly on section 34 of the Constitution which provides that:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.¹⁰

In the court of first instance the insured ultimately preferred to rely directly on the Constitution and not on the argument that the time limitation offended against public policy.¹¹

Uncertainty existed as to whether the Constitution of the Republic of South Africa Act 200 of 1993 (“the Interim Constitution”) only engaged relationships that also involved the state, and therefore applied vertically, or whether it also applied horizontally, meaning that it also concerned relationships that did not involve the state. According to De Villiers J the (final) Constitution resolved these uncertainties. The Constitution now applies to all law, which includes contract law, and the judiciary is bound to apply the Constitution

⁵ *IGI Insurance Co Ltd v Madasa* 1995 1 SA 144 (TkA); *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 (A); *Smith v Santam Bpk* 1996 2 SA 334 (O). See also the discussion in *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 1 SA 311 (C).

⁶ Hopkins “Insurance Policies and the Bill of Rights: rethinking the Sanctity of Contract Paradigm” 2002 *SALJ* 155 and “The influence of the Bill of Rights on the enforcement of Contracts” 2003 *De Rebus* 22; Reinecke et al *General Principles of Insurance Law* para 318.

⁷ *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 http://www.osall.org.za/docs/Hotdocs/Barkhuizen_v_Napier_TPD_Sept2004.pdf (accessed 02-10-2008). References will be to pages as set out in the pdf version of this case.

⁸ *Napier v Barkhuizen* 2006 4 SA 1 (SCA).

⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC).

¹⁰ Para 5. The summary of Cameron JA in *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 2 is somewhat confusing. He starts off by saying that the insured invoked the Constitution. But he then seems to suggest that the insured submitted that (i) the limitation was against the public interest because it offended against the common law right to invoke the courts and (ii) that he relied on s 34 of Constitution.

¹¹ *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 5. This was addressed on the papers before court in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 8.

in this manner.¹² The judge then determined whether the Constitution was applicable in the circumstances. He relied on section 8(2) of the Constitution which determines that

“[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.

After considering the nature of the right set out in section 34 and the duties imposed by the right, he accepted that section 34 was applicable to the time-limitation provision. The judge then applied section 8(3)(a).¹³ The relevant provisions read as follows:

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right ...”.

No legislation applied in this situation and the common law only gave effect to the contract. The common law had to be developed to give effect to the Constitution. For this purpose the judge also relied on section 39(2):

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.¹⁴

An appropriate remedy could then be crafted in accordance with section 38.¹⁵

De Villiers J then turned to the limitation of the right. He assumed that a contract could not be judged against specific constitutional rights without any qualification. But on what basis could constitutional rights be qualified in these circumstances? The limitations clause, section 36, determines that:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...”.

This provision only allows limitation in terms of a law of general application. At first glance the contractual provision did not appear to be such a provision. This obstacle was surmounted by attaching a wide interpretation to the expression “law of general application” and by relying on the maxim of *pacta sunt servanda* in the context of the time-limitation clause. The judge stated that “[i]n casu sou die ‘algemeen geldende regsvoorskrif’ wees dat ’n ooreenkoms bindend is”,¹⁶ but in his analysis of section 36 he seems to have thought that this argument transforms the contractual clause itself into a law of general application.¹⁷

¹² *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 8 with apparent reference to s 8(1)

¹³ 9

¹⁴ De Villiers J stated that the values in s 39(1)(a) had to be promoted in the process (*Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 10)

¹⁵ 10

¹⁶ 13 (“In casu the ‘law of general application’ would be that an agreement is binding”)

¹⁷ See especially 17 where he concluded that “[d]ie verweerder ... nie sy plig gekwyd het om te toon dat die ooreenkoms vervat in klousule 5 2 5 ’n redelike regverdigbare beperking van die eiser se reg op toegang tot die hof is nie” (“the defendant ... has not acquitted itself of the duty to show that the agreement set out in clause 5 2 5 is a reasonably justifiable limitation of the right of the plaintiff of access to the court”)

The court further found that it could declare a contractual provision invalid if it contravened the Constitution, on the basis that section 172(1)(a) obliged it to “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”. De Villiers J relied on his previous conclusion that the time limitation was a law in the wider sense. He then declared the provision to be void for being inconsistent with the Constitution.¹⁸

In the Supreme Court of Appeal, Cameron JA stated that the crisp question was: “are time-bar clauses in short-term insurance contracts unconstitutional”?¹⁹ The judgment of the court a quo was interpreted as raising two questions. The first concerned the extent to which the Constitution applied between contracting parties. The second was whether a time-bar provision could be rendered unconstitutional in accordance with section 34.²⁰ The second question was then answered by finding that the specific right guaranteed in section 34 could not justify striking down the disputed time limitation in the particular case.²¹

On the first question, Cameron JA accepted the broad correctness of the “general premise” expressed in the court a quo that “contractual terms are subject to constitutional rights”.²² He justified his support for this proposition with reference to his concurring judgment in *Brisley v Drotzky*.²³ There he had confirmed that the law in general and the law of contract in particular are subject to the Bill of Rights and that fundamental constitutional values had to be taken into account in developing contract law. But he followed this broad statement with the narrower conclusion that being subject to the Constitution means that

“... courts are obliged to take fundamental constitutional values into account while performing their duty to develop the law of contract in accordance with the Constitution”.²⁴

Cameron JA then relied on *Brisley* for the proposition that public policy had to be derived from founding constitutional values and that a court will invalidate a contract that offends against public policy.²⁵ He then concluded that such a constitutional challenge failed in this case for lack of proof.²⁶

Ngcobo J, writing for the majority in the Constitutional Court, remarked that the insured had conflated two different arguments. He relied on section 34 as a reflection of public policy but also asked the court to apply section 34 directly

¹⁸ 17 A general summary of these arguments can be found in *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 9-10

¹⁹ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 1 See also the discussion of Bhana “The Law of Contract and the Constitution: *Napier v Barkhuizen* (SCA)” 2007 *SALJ* 269

²⁰ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 5

²¹ Para 17ff (discussed in 3 below)

²² Para 6

²³ *Brisley v Drotzky* 2002 4 SA 1 (SCA) paras 88-95 with reference to ss 2, 8(1) and 39(2) of the Constitution

²⁴ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 6

²⁵ Para 7 and see para 8 where it is argued, with reference to *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA), that a contract concluded by parties in a position of unequal bargaining power may in certain circumstances be struck down on the basis of “public policy and constitutional grounds” See also the reference to cases dealing with public policy in n 5 above

²⁶ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 10ff

to the time limitation provision.²⁷ The judge felt that the case required, as a threshold issue, that the proper methodology for constitutional challenges to contractual terms had to be determined.²⁸ He then asked whether it was appropriate to test a contractual clause against a provision of the Bill of Rights and commenced by observing that

“[t]his raises the question of horizontality, that is, the direct application of the Bill of Rights to private persons as contemplated in section 8(2) and (3) of the Constitution. This Court has yet to consider this issue”.²⁹

Ngcobo J rejected the court a quo’s attempt to overcome the two technical difficulties created by the wording of section 36 and section 172(1)(a).³⁰ Hanging the clause on the peg of the *pacta sunt servanda* principle did not surmount these difficulties,³¹ as it was the contractual clause that was found to be flawed. Moreover, section 172(1)(a) could not have been applied to the contractual provision on the basis that it constituted “conduct” as it “manifestly” did not fall into this category.³² He postulated that these difficulties

“... cast grave doubt on the appropriateness of testing the constitutionality of a contractual term directly against a provision in the Bill of Rights”.³³

He further concluded that constitutional challenges to contractual terms should ordinarily have to be viewed through the prism of public policy,³⁴ and that

“... the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular those found in the Bill of Rights.”³⁵

Further justifications were given for this approach. First, all law derives from the Constitution and is therefore subject to constitutional control.³⁶ Any common law rule of the law of contract would be invalid in so far as it is inconsistent with the Constitution. Courts are furthermore obliged in terms of section 39(2) to develop the common law in accordance with the Constitution.³⁷ Secondly, public policy is rooted in the Constitution, and therefore the Constitution should impact on contracts through public policy.³⁸ Thirdly, the proposed approach would allow proper space for bal-

²⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 20

²⁸ Para 22

²⁹ Para 23

³⁰ Paras 23–26, 30

³¹ See text before n 17 above

³² Paras 24–27

³³ Para 26

³⁴ Paras 28–30, 36

³⁵ Para 30

³⁶ See also *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 27; *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; *S v Thebus* 2003 6 SA 505 (CC) para 25; Woolman “Application” in Woolman, Roux & Bishop *Constitutional Law of South Africa* 2 ed (2006) 31–8, 31–49

³⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35

³⁸ Paras 27–30

ancing the principle of freedom of contract against the values enshrined in the Constitution.³⁹

The judges who handed down dissenting minority judgments, Sachs J and Moseneke DCJ, unquestioningly measured the time limitation against public policy as infused by the Constitution.⁴⁰ Nevertheless, Langa CJ in a separate concurring judgment expressed his disagreement in so far as Ngcobo J held that the Constitution could only apply to contracts indirectly and in terms of section 39(2). Indirect application would generally be best for dealing with the types of problems before the court, but Langa CJ was “not convinced that section 8 does not allow for the possibility that certain rights may apply directly to contractual terms or the common law that underlies them”.⁴¹

Direct application of the Constitution would be justified in some cases. Still, he left open the question whether the Constitution could have been directly applied in this case, and accepted that the choice between direct and indirect application would seldom be outcome determinative.⁴²

2 1 Evaluation: the broad themes

Ngcobo J’s statement that the Constitutional court had not previously considered the horizontal application of the Constitution appears to be incorrect.⁴³ Nevertheless, the exact impact of the Constitution on private or horizontal relationships continues to be a highly problematic and controversial area of law.⁴⁴ The confusion can in no small part be attributed to the imprecise wording of the Constitutional provisions that deal with this aspect.⁴⁵ However, as is shown by the judgments in this matter, the courts have certainly played their part in worsening the muddle.

Two aspects should form the backbone of any evaluation of the application of the Constitution to private law and private relations.

First, the Constitution is to be given a wide field of application. After the Constitutional Court interpreted the application provisions in the Interim Constitution restrictively,⁴⁶ the drafters of the final Constitution were at pains to extend its field of application.⁴⁷ The preamble of the Constitution already

³⁹ Para 30 See also the approach in para 48 to the limitation of constitutional rights in the context of public policy and its relation to s 36

⁴⁰ Especially para 93ff, paras 122-124, 158-161, 162-163, 170, 174, 176-177, 181, 183, 185

⁴¹ Para 186

⁴² Para 186

⁴³ Para 23 See *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 29ff; Woolman “The amazing vanishing Bill of Rights” 2007 *SALJ* 762 773 However, it is possible that Ngcobo J only meant the statement to apply in the context of contract law

⁴⁴ It may be that the term “horizontal” in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 23 was used to mean *direct* horizontality This is perhaps how the term “horizontal” was understood in the court a quo See generally Woolman “Application” in *Constitutional Law of SA* 31-5 n 1

⁴⁵ Currie & De Waal *The Bill of Rights Handbook* 5 ed (2004) 50 call the provisions opaque and apparently circular

⁴⁶ *Du Plessis v De Klerk* 1996 3 SA 850 (CC)

⁴⁷ Cheadle “Application” in Cheadle, Davis & Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed service 6 (2005) 3-8 to 3-9; Currie & De Waal *Bill of Rights Handbook* 34; Van der Walt “Perspectives on Horizontal Application: *Du Plessis v De Klerk* revisited” 1997 *SA Publikereg* 1 8-9 with reference to the judgement of Kriegler J in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 717; Woolman “Application” in *Constitutional Law of SA* 31-6, 31-76 n 1

confirms that society has to be fundamentally reformed. The Constitution makes a clear break with the preceding legal order. It is impossible to think that this break should not also have profound consequences for horizontal relationships. Many of the abuses of the apartheid system and much of the exploitation that marked apartheid society occurred on a horizontal level.⁴⁸ Private law assisted in creating the values of apartheid South Africa against which the Constitution turns its face: equality must replace inequality, dignity repression and transparency suppression of information. A restrictive approach would rely on the public-private divide to an extent that simply does not accord with the basic tenets of our Constitution and society.⁴⁹

Secondly, there is a need for a logical and sensible scheme for dealing with the Constitution in relationships between private parties. Although different and conflicting interpretations may achieve acceptable results in some cases and be justifiable on the strict wording of the Constitution, inconsistent judgments on the meaning of direct and indirect application are untenable. The resulting confusion makes it difficult to follow and develop the reasoning of the courts. Moreover, it will be argued that different consequences will ensue depending on the manner in which the Constitution applies to private law.⁵⁰ Consistency therefore must be an important goal also for this area of law.⁵¹

Especially the first point of departure should be clearly articulated. Less time should be devoted to arcane technical arguments regarding the mechanics for applying the Constitution in private relations.

Ngcobo J's rebuke in *Napier* of counsel's conflation of arguments confirms that parties in a horizontal relationship should clearly choose their path to the Constitution.⁵² However, it is not clear what direct and indirect application entails and how direct application relates to indirect application of the Constitution.⁵³ Commentators and courts struggle to find common ground because there appears to be no universal meanings of the expressions "direct" and "indirect" application.⁵⁴

⁴⁸ These arguments are not trumped by the counter-arguments of Sprigman & Osborne "Du Plessis is not dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" 1999 *SAJHR* 25 40ff. They are not sensitive enough to the unique needs of South Africa. Nevertheless, some of their arguments should caution the courts in giving sway to the Constitution in particular cases (see n 71 below). The response of Woolman "Application" in *Constitutional Law of SA* 31-139 to 39-141 is not adequate.

⁴⁹ Woolman "Application" in *Constitutional Law of SA* 31-5. In this regard, the principle of avoidance articulated by Currie & De Waal *Bill of Rights Handbook* 50, 75-78 and De Waal, Currie & Erasmus *The Bill of Rights Handbook* 4th ed (2001) 37, 194-195 must be approached with care. See the criticism of Woolman "Application" in *Constitutional Law of SA* 31-141ff. Cf also the response of Sprigman and Osborne 1999 *SAJHR* 46. For a good summary of the arguments relating to the way in which the division between public and private law plays out in the law of contract, see Pretorius "Individualism, Collectivism and the limits of Good Faith" 2003 *THRHR* 638.

⁵⁰ See text after n 117 below.

⁵¹ Woolman "Application" in *Constitutional Law of SA* 31-10, 31-13, 31-55 to 31-56; Woolman 2007 *SALJ* 763.

⁵² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 20.

⁵³ See also the descriptions in Currie & De Waal *Bill of Rights Handbook* 35.

⁵⁴ See the summary of arguments in Woolman "Application" in *Constitutional Law of SA* 31-136.

2 2 Direct application of the Constitution in terms of section 8

When answering his first question regarding the extent to which the provisions of the Bill of Rights will apply between contracting parties, Cameron JA stated that the “law of contract” is subject to the Constitution and that “[t]his means that courts are obliged to take fundamental constitutional values into account”.⁵⁵ This probably is a reference to indirect application.⁵⁶ Accordingly, it may be suggested that he eschewed direct application in favour of indirect application. However, such a conclusion is not justifiable. He opened this part of the judgment with the “general endorsement” of the direct approach followed in the court a quo.⁵⁷ It is evident from *Brisley v Drotsky*,⁵⁸ on which he relied in *Napier*,⁵⁹ that he accepted the possibility of both direct and indirect application.⁶⁰ The judge’s emphasis on indirect application in answering his first question, perhaps makes sense only if it is read subject to the conclusion reached on the second question, namely that section 34 of the Constitution was not directly applicable on the facts.⁶¹ However, the judgment does not promote a better understanding of direct application.

Ngcobo J in *Napier* confirmed that sections 8(2) and 8(3) are the central provisions which determine direct application of the Constitution to private parties.⁶² On the face of it, the approach of Ngcobo J seems to resemble that of O’Regan J in the earlier case of *Khumalo v Holomisa*.⁶³ De Villiers J in the court a quo, by implication, relied on section 8(1) as the catalyst for directly applying the Constitution because that provision determines that the “Bill of Rights applies to all law” and binds the judiciary, but he accepted that section 8(1) was subject to sections 8(2) and 8(3).⁶⁴ This understanding accords with what Stuart Woolman calls a “good faith” interpretation of the *Khumalo* case.⁶⁵

It is preferable to anchor horizontal application of the Constitution in section 8(1) and Ngcobo J’s judgment is perhaps open to a more benevolent interpretation. It could be that he merely omitted a reference to section 8(1) because sections 8(2) and 8(3) determine how the Constitution will apply to

⁵⁵ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 6-8

⁵⁶ See 2 3 below

⁵⁷ Para 6

⁵⁸ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 88

⁵⁹ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 6

⁶⁰ See *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 38 where the Constitutional Court found that the public policy argument was “run together with the argument on direct application”

⁶¹ Para 17ff and see 3 below

⁶² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 23 See also Currie & De Waal *Bill of Rights Handbook* 43 Van der Walt “Progressive Indirect Horizontal Application of the Bill of Rights: towards a co-operative relation between Common-Law and Constitutional Jurisprudence” 2001 *SAJHR* 341, 351 regards s 8(2) as the basis for direct application but he takes a particularly narrow view of direct application See further Van der Walt 1997 *SA Publiekreg* 4-5, 16 n 28, 20 on the possible interpretations of s 8(2) within his scheme

⁶³ *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 31-32

⁶⁴ *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 8ff Cameron JA also wrote in the idiom of s 8(1) when describing the basis for applying the Constitution in *Brisley v Drotsky* 2002 4 SA 1 (SCA) He relied on this case in *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 6, although it is unclear how he viewed the relationship between s 8(1) and other parts of s 8

⁶⁵ See Woolman “Application” in *Constitutional Law of SA* 31-7, 31-47, 31-63; Woolman 2007 *SALJ* 773

horizontal relationships and are specifically dedicated to horizontal relationships. Nevertheless, Woolman argues that the provision which unlocks direct application is the widely worded section 8(1) and that sections 8(2) and 8(3) play a very restrictive role in resolving application problems. He relies on three basic criticisms for rejecting his good faith interpretation of the *Khumalo* case.⁶⁶ The first two criticisms are that it would cause the application of the Constitution to private parties to be deferred and potentially suppressed,⁶⁷ and that this interpretation does not respect the wording of section 8(1).⁶⁸ The third criticism is that such an interpretation would be a retrograde step. The Interim Constitution applied, without more, to statutes even where they applied horizontally. But if this interpretation is accepted, the application of the Constitution in these situations would be subject to section 8(2). This would cause inconsistent treatment of legislative provisions that apply to horizontal as well as vertical relationships.⁶⁹

The first two criticisms can be addressed with relative ease. When it is said that section 8(2) is central to the operation of the Constitution, it does not mean that section 8(1) is not applicable to horizontal relationships. Section 8(1) is a general provision that must be read subject to the more specific section 8(2).⁷⁰ Furthermore, some deferment of the application of the Bill of Rights may be necessary to ensure that the rights applied are appropriate to private relationships,⁷¹ albeit that the threshold should be relatively low.⁷² Application questions are open and shut. In most cases the focus should not be on whether a provision in the Bill of Rights applies directly, but rather on the extent to which it applies.

The last criticism calls for a more sophisticated response.⁷³ As long as the purpose of section 8(2) is to determine whether it will be appropriate to apply a Constitutional provision to a horizontal relationship, it makes sense to have it apply to all horizontal relationships, whether they are subject to statutory or common law.⁷⁴ The application of section 8(2) to statutory provisions will not be a retrograde step as long as it is applied with some sensitivity. Where legis-

⁶⁶ Woolman "Application" in *Constitutional Law of SA* 31-6ff, 31-42ff, 31-63 to 31-64; Woolman 2007 *SALJ* 773

⁶⁷ Woolman "Application" in *Constitutional Law of SA* 31-48 to 31-49

⁶⁸ 31-52 to 31-53, 31-56ff

⁶⁹ 31-49 to 31-52

⁷⁰ 31-7, 31-47ff, 31-62ff Woolman distinguishes "range of application" and "prescriptive content" See also the somewhat analogous distinction drawn in De Waal et al *The Bill of Rights Handbook* 37, 46 and the reference to "reach" and "application", but cf Woolman "Application" in *Constitutional Law of SA* 31-141ff The argument is made slightly differently in Currie & De Waal *Bill of Rights Handbook* 43-44; see also the argument on the meaning of s 8(1) at 48

⁷¹ Currie & De Waal *Bill of Rights Handbook* 52-55 See Sprigman and Osborne 1999 *SAJHR* 41ff who argue that this calls for indirect application of the Constitution I do not agree but believe it should play some role in determining whether the Constitution can be directly applied

⁷² See Currie & De Waal *Bill of Rights Handbook* 52-54 The application of s 8(2) in *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 9-10 appears to be quite superficial, but perhaps little more is called for

⁷³ See also Van der Walt 2001 *SAJHR* 347 who argues that these are not horizontal application cases and the different earlier argument by Van der Walt 1997 *SA Publiekreg* 19 n 36

⁷⁴ If the same situation had occurred in 2001, the question before court would have been whether the rule in the Policyholder Protection Rules (Short-term Insurance) 2001 para 10 4 (replaced by para 7 4(a) in 2004) accorded with the Constitution These rules have been enacted as subordinate legislation in terms of s 55 of the Short-term Insurance Act 53 of 1998

lation applies in vertical and horizontal relationships, it is unlikely that section 8(2) will have a substantial effect on the manner in which the Constitution is applied. Furthermore, the distinction between sections 8(1) and 8(2) will not lead to inconsistency as long as private parties to a dispute are allowed to attack a provision on the basis that it also applies in vertical relationships where it will be inconsistent with the Constitution. No difficulty will arise, if a provision applies both to vertical and horizontal relationships, as long as parties in a horizontal relationship are allowed to attack the provision on the basis that it would be unconstitutional if it is applied vertically, and if the provision would then also cease to apply horizontally.

Finally, and in response to all his objections, it seems that Woolman finds it exceedingly difficult to make sense of sections 8(2) and 8(3) on his expansive interpretation of section 8(1).⁷⁵

So what function should section 8(3) then play in applying the Constitution in horizontal relationships? It will be apparent from the initial analysis that De Villiers J in the court *a quo* wavered between direct application of the Constitution to the contract itself and direct application to the law of contract. He acknowledged that section 8(3) requires development of the common law but the contractual provision was, for the most part, measured directly against the provisions of the Constitution.⁷⁶ The judge's attempt to circumvent the difficulties of applying sections 36 and 172 directly to the contract was rightly regarded as confusing by Ngcobo J. However, the reasoning of the Constitutional court is itself incomplete.

First, it does not show that section 36 could not have been applied in this context. A better response would have been to evaluate the contractual clause by balancing section 34 directly against the principle of *pacta sunt servanda* and its more specific application in the context of time limitations: to regard the contractual clause as the object that had to be evaluated after balancing section 34 and these countervailing laws of general application. This would not have made the application of the Constitution "indirect".

Furthermore the court merely could have treated the contractual provision, or at least its conclusion, as "conduct", which may be declared invalid in terms of section 172.⁷⁷ The court *a quo* probably slid into difficulty because it did not clearly articulate the form which direct application was to take in the circumstances.

Nevertheless, there may be another unassailable objection to the direct application of the Constitution to a contractual provision as contemplated in

⁷⁵ Woolman "Application" in *Constitutional Law of SA* 31-56ff is very complicated and not entirely convincing. See especially 31-74 to 31-75 where the author apparently ignores the specific reference in s 8(3) to s 8(2). It may also be proposed that s 8(2) and 8(3) is intended to be used to fill gaps where they exist in the extant common law but the criticism of this approach by Woolman persuasively disposes of such an argument 31-11, 31-65 to 31-66, 31-71 to 31-74. The most important reason for the exposition in *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 31 was an attempt to make sense of all aspects of s 8.

⁷⁶ Text after n 11 above.

⁷⁷ It is not at all clear why the clause was described as "manifestly not 'conduct'" (*Barkhuizen v Napier* 2007 5 SA 323 (CC) para 25 per Ngcobo J). See the somewhat different criticism of Woolman 2007 *SALJ* 774-775. It is based on an interpretation of the case which does not appear to be defensible.

the court a quo. In *Khumalo*⁷⁸ the court accepted that section 8(3) means that the common law has to be evaluated and developed to accord with the Constitution, once the hurdle of section 8(2) has been crossed and it is found that the common law conflicts with the Constitution.⁷⁹ This would leave considerable scope for the direct application of the Constitution to the common law. Conversely, it would almost close off application of the Constitution as directly applicable law to conduct, whether in the form of contracts or otherwise, in disputes between private parties. It could be argued that Ngcobo J only used the expression “direct application” to refer to application of the Constitution to contractual provisions.⁸⁰ This reflects too narrow an understanding of direct application. But the grave doubt which Ngcobo J expressed about the propriety of testing “the constitutionality of a contractual term directly [in this narrow sense] against a provision of the Bill of Rights”⁸¹ conceivably should be understood to refer only to this very narrow understanding of direct application.⁸²

There is one more or less plausible alternative interpretation of section 8(3). The provision may be read to mean that it merely provides for the development of remedies to enforce directly applied Constitutional precepts.⁸³ Such an interpretation leaves a wider domain for section 8(1) and accords better with the ordinary meaning of the term “direct application”. But this construction relies too heavily on the phrase “in order to give effect to the right” and does not adequately explain the relationship between sections 8(2) and 8(3). This of course does not mean that section 8(3) does not at least also allow for the development of adequate remedies, but perhaps it should not be interpreted to have only this function.

It therefore is sensible to give section 8(3) a wide interpretation and to allow Constitutional influence to occur through development of the current common law as it ensures systemic accommodation of the Constitution in the common law.⁸⁴ There is a danger that this opens the door for those who want to restrain the Constitution in the corset of existing common law, but this

⁷⁸ *Khumalo v Holomisa* 2002 5 SA 401 (CC)

⁷⁹ This apparently is also the view of O'Regan J in *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 32-33. See also Cockrell “Private law and the Bill of Rights: a threshold issue of ‘Horizontalty’ in *Bill of Rights Compendium* service 22 (1998) paras 3A8 and 3A7; Lubbe “Taking Fundamental Rights seriously: the Bill of Rights and its implications for the development of Contract Law” 2004 *SALJ* 395 especially 395-396, 407. See also the sophisticated argument of Lubbe 2004 *SALJ* 403-404 regarding the distinction between the application of the Constitution to conduct and law and its development by means of open legal norms. The description of the operation of the Constitution put forward here would be correct as long as these norms can be described as law (see n 160 below).

⁸⁰ When referring to direct application, this is the only form of application apparently contemplated by Ngcobo J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 16, 20, 26, 38. But this should be contrasted with the approach of Langa CJ, who accepted that direct application could concern the application of a right to “contractual terms or the common law that underlies them” (para 186).

⁸¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 26.

⁸² See n 44 above on the problems with terminology in this case and text next to nn 99-101 below.

⁸³ *Jooste v Botha* 2000 2 SA 199 (T) 203ff. See also Currie & De Waal *Bill of Rights Handbook* 226-227; De Waal et al *The Bill of Rights Handbook* 194-196; and the somewhat wider approach of Woolman “Application” in *Constitutional Law of SA* 31-66ff.

⁸⁴ Section 8(3) would make it impossible for parties to rely directly on the Constitution when there are rules of contract law which deal with the issue. An analysis of this issue is provided in Van der Merwe, Van Huysteen, Reinecke & Lubbe *Contract General Principles* 3 ed (2007) 16-18.

danger will have to be addressed elsewhere if proper effect is to be given to the Constitution in private law relationships.⁸⁵

2 3 Application of the Constitution in terms of section 39(2)

So when will the Constitution be applied indirectly?⁸⁶ Section 39(2) is generally interpreted to form the basis for indirect application of the Constitution. This section *inter alia* states that

“... when developing the common law ... every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.⁸⁷

In *S v Thebus*,⁸⁸ Moseneke J accurately observed that

“[t]his section does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified.”⁸⁹

He continued that

“the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted and developed to create harmony with the ‘objective normative value system’ found in the Constitution”.⁹⁰

Many courts have utilized section 39(2) without much contemplation about its place within the constellation of application provisions.⁹¹ But if section 8 is given the wide sway proposed in *Khumalo*,⁹² it would make sense to read section 39(2) restrictively. In terms of section 39(2) reference therefore should not be made to the specific rights listed in the Constitution, but reliance should be placed on the general values underlying the Constitution.⁹³

Iain Currie and Johan De Waal have listed several mechanisms for indirect application of the Constitution. Obviously, the common law may be applied with due regard to the Bill of Rights.⁹⁴ Next, open-ended common law norms such as good faith, public policy and the legal convictions of the community may be developed in the light of the Bill of Rights.⁹⁵ Finally, it is

⁸⁵ Van der Walt 2001 *SAJHR* 355, 359ff. Lubbe 2004 *SALJ* 399 401 argues that this approach mirrors the narrow approach to public policy and good faith that has emanated from the Supreme Court of Appeal in recent times. See text next to nn 179-180 below.

⁸⁶ Van der Walt 2001 *SAJHR* 345 takes a narrow view of indirect application. See the difficulties foreseen by Lubbe 2004 *SALJ* 399 423.

⁸⁷ Of course it is difficult to determine exactly what this means. Woolman “Application” in *Constitutional Law of SA* 31-93 to 31-95.

⁸⁸ 2003 6 SA 505 (CC).

⁸⁹ Para 25.

⁹⁰ *S v Thebus* 2003 6 SA 505 (CC) para 28. Currie & De Waal *Bill of Rights Handbook* 67; Lubbe 2004 *SALJ* 402-403.

⁹¹ See text next to n 123.

⁹² *Khumalo v Holomisa* 2002 5 SA 401 (CC).

⁹³ Woolman “Application” in *Constitutional Law of SA* 31-12, 31-78ff. I therefore agree fully with the criticism of *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC) in Woolman 2007 *SALJ* 767ff.

⁹⁴ Although s 39(2) refers merely to interpretation of legislation, the term “developing” probably should be interpreted widely.

⁹⁵ Van der Walt 2001 *SAJHR* 351-352.

also uncontroversial that specific common law norms may be developed with reference to the Bill of Rights.⁹⁶ The only difficulty would be to determine to what extent development will be possible in terms of section 39(2).⁹⁷ In the ordinary course, the development of the common law is in the hands of the courts. Development is normally subject to many constraints ranging from the *stare decisis* principle to the notion that law should be made by the democratically elected legislator rather than the judiciary. However, it is suggested that these constraints are of reduced significance in the Constitutional context.⁹⁸

In *Napier* Cameron JA did not refer specifically to section 39(2) or section 8 but in answering the first question regarding the extent to which the Constitution applied between the contracting parties, he used the language of indirect application.⁹⁹ Ngcobo J apparently did not think that the Constitution could be applied to contracts in terms of sections 8(2) and 8(3) (the direct application provisions).¹⁰⁰ For the most part he wrote in the idiom of indirect application as it is understood in section 39(2). Yet he curiously did not conclusively pin his colours to one Constitutional mast. Indeed, he mentioned that the common law had to be developed with reference to both section 39(2) and section 8(3)(b).¹⁰¹

Cameron JA resolved his first question with reference to fundamental or founding Constitutional values, which he gleaned from section 1 of the Constitution.¹⁰² Conversely, Ngcobo J referred to “values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights”¹⁰³ and “constitutional values, in particular those found in the Bill of Rights”.¹⁰⁴ The approach of the Constitutional Court is confused and it disrespects the Constitutional text.¹⁰⁵ It demotes specific constitutional rights to the level of values – what Stuart Woolman colourfully calls “speaking in values”.¹⁰⁶ Woolman states that the court “decided not to analyze the problem in terms of any of the specific substantive provisions”.¹⁰⁷ This does not appear to be correct. Considerable reference was made to section 34 and its effect. Woolman admits as much later in his article.¹⁰⁸ However, by filtering it

⁹⁶ Currie & De Waal *Bill of Rights Handbook* 68-69

⁹⁷ S 39(2) does not require development but only determines that development must be done in terms of the Constitution

⁹⁸ See text next to nn 117-122 and 135-139 below

⁹⁹ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 6ff. See also *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 16 where Ngcobo J considered that the second part of Cameron JA's judgment concerned direct application

¹⁰⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 23ff. See the argument of counsel in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 16, discussed in Lubbe 2004 *SALJ* 399

¹⁰¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35. See also the argument made in the text next to nn 80-82 above, and the narrow focus on indirect application discussed in the text next to n 129 below. See further nn 130, 131 below

¹⁰² *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 6-7, 11, 13, 14. See also *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 91

¹⁰³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 29

¹⁰⁴ Para 30. Moseneke DCJ emphasized “constitutional values” (para 104) but he apparently interpreted the expression widely, as he made specific reference to s 34 in the context of public policy. See para 108 where he referred with approval to the judgment of Sachs J

¹⁰⁵ Woolman 2007 *SALJ* 778 describes this sentence as “odd indeed”

¹⁰⁶ 763

¹⁰⁷ 772

¹⁰⁸ 777ff

through values the court diluted section 34, and then equated it with sanctity of contract, which is not specifically guaranteed in the Constitution.¹⁰⁹ The approach followed confuses direct application, which concerns specific constitutional rights, with indirect application, which should occur by reference to the values underlying the Constitution.¹¹⁰

Cameron JA in answering his first question emphasized that the Constitution would impact upon contract law through public policy.¹¹¹ Ngcobo J regarded the requirement that a contract should not conflict with public policy as the contract law construct that had to be utilized to absorb constitutional principles in the law of contract.¹¹² However, the justifications for using public policy as the necessary hook to hang constitutional principles onto the law of contract are unconvincing.

Both judges relied on the idea that public policy can now be sourced from the Constitution. The correctness of this statement will be challenged,¹¹³ but even if it is accurate, then it still does not follow that the Constitution should necessarily be applied through the medium of public policy.

Furthermore, the contention of Ngcobo J that all law is now derived from the Constitution and that constitutional values should be mediated through public policy is a *non sequitur*. The first statement is a justification for judging contract law against the Constitution, but it cannot be used to justify the use of public policy for this purpose.

Finally, Ngcobo J's suggestion that account should be taken of constitutional principles through public policy, because it would allow proper space for balancing constitutional rights with the principle of *pacta sunt servanda*, is similarly unpersuasive. It is wrong for three reasons. First, it is based on the incorrect assumption that section 36 cannot be used to limit a constitutional right when the constitutionality of a contract is considered directly. Secondly, the argument that space should be left for balancing constitutional principles against *pacta servanda sunt*, even if it favours indirect application, cannot be used to show that such indirect application should take place specifically through the medium of public policy. Thirdly, the contention accords too much weight to sanctity of contract. Ngcobo J's wide approach regarding the meaning of constitutional principles, could be seen as a licence for courts to equate specifically guaranteed constitutional rights with sanctity of contract which does not have the same status.¹¹⁴

Yet, a better justification for applying the Constitution through public policy in a case such as this can be found in the law of contract. Contracts that conflict with public policy, like contracts that conflict with ordinary legislation, are illegal because they conflict with broader societal interests. Most

¹⁰⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57. This comment has already been made about the cases before *Barkhuizen v Napier* 2007 5 SA 323 (CC) Van der Merwe et al *Contract* 322-323.

¹¹⁰ See text next to nn 139-141, 158 below.

¹¹¹ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 8. See the analysis of earlier cases in Lubbe 2004 *SALJ* 399-400.

¹¹² See text next to n 34 above.

¹¹³ See 2.5 below.

¹¹⁴ See also text next to n 109 above.

constitutional values will be relevant to contracts for the same reason. Even in the pre-constitutional era, contracts that deprived contracting parties of access to the courts were illegal for being against public policy.¹¹⁵ Nevertheless, this justification will not apply universally. The manner in which the Constitution should apply ought to depend on the nature of the constitutional right and the nature of the attack on existing contract law. Public policy often will be the most appropriate area for accommodating the Constitution, but it will not always be the case.¹¹⁶

2 4 The priority of sections 8 and 39 and the interface between these provisions

The difference between direct and indirect application should not be exaggerated.¹¹⁷ It will indeed be difficult to show that a particular choice of approach will be “outcome determinative”.¹¹⁸ Nonetheless, the distinction will have some consequences. The rules regarding *locus standi*,¹¹⁹ remedies¹²⁰ and the application of the *stare decisis* principle¹²¹ may give the Constitution wider sway in cases of direct application. Moreover, there are symbolic and methodological differences between direct and indirect application of the Constitution, which perhaps may strengthen the influence of the Constitution when it is directly applied.¹²² So how have the various courts in the *Napier* matter tackled this relationship between direct and indirect application of the Constitution?

There appears to be a general bias in favour of indirect application in the case law. Judges have often opted for indirect application without much deliberation.¹²³ In *Napier*, even Langa CJ, who was prepared to allow a wider scope for direct application of the Constitution, accepted that contractual terms will “ordinarily” be subject to indirect application of the Constitution.¹²⁴

Outside the judgment of Langa CJ, the *Napier* case is not helpful in determining priorities. De Villiers J in the court a quo did not clearly consider

¹¹⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 34. See also *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 10 with reference to Christie *The Law of Contract in South Africa* 4 ed (2001) 405-407.

¹¹⁶ Christie “The Law of Contract and the Bill of Rights” in *Bill of Rights Compendium* issue 22 (1998) para 3H6. See also Lubbe 2004 *SALJ* 405 and Van der Merwe et al *Contract* 192 on the manner in which incongruence of contracts with the Constitution should be dealt with.

¹¹⁷ Currie & De Waal *Bill of Rights Handbook* 50-51, 74-75; Du Plessis v *De Klerk* 1996 5 BCLR 658 (CC) 697 per Mahomed DP; Van der Walt 1997 *SA Publiekreg* 3; Van der Walt 2001 *SAJHR* 343, 348, 355. See 2 1 and text next to nn 97-98 above and text next to nn 135-139 below.

¹¹⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 186 per Langa CJ.

¹¹⁹ De Waal et al *The Bill of Rights Handbook* 64, 83. See also Currie & De Waal *Bill of Rights Handbook* 81-82 who show that this distinction may not be of great importance.

¹²⁰ Currie & De Waal *Bill of Rights Handbook* 74-75, but see text next to n 83 above. Their argument is based on a somewhat different approach to direct and indirect application.

¹²¹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) paras 27-29; Currie & De Waal *Bill of Rights Handbook* 69-72; Lubbe 2004 *SALJ* 409-410, 415, 419; *S v Walters* 2001 2 SACR 471 (Tk); Woolman “Application” in *Constitutional Law of SA* 31-95ff.

¹²² This perhaps is one of the main reasons why the Constitution has not been applied in private relations in a more “muscular” manner. Woolman 2007 *SALJ* 766 n 6.

¹²³ Currie & De Waal *Bill of Rights Handbook* 50-51.

¹²⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 186. It is therefore doubtful whether Woolman 2007 *SALJ* 762 is correct when he states that the Chief Justice “possessed the requisite insight to steer clear of this miasma of legal reasoning”.

the relationship between direct and indirect application. He merely applied section 34 directly. Cameron JA did not explain his priorities very clearly, and the order in which he addressed direct and indirect application of the Constitution leaves much to be desired.¹²⁵ Ultimately, all that can be said about his judgment is that he probably recognized both direct and indirect application.¹²⁶ Ngcobo J focused on indirect application¹²⁷ and left little room for direct application.¹²⁸ He only foresaw that different considerations would apply where the state is a party to the contract, but he did not elaborate on whether this would also apply where the state does not exercise state power and is an ordinary contracting party in this sense.¹²⁹

Nevertheless, the preceding analysis suggests that the bias in favour of indirect application should be reconsidered. If a specific Constitutional right is implicated, a section 8 analysis should be peremptory. Such an analysis will also require consideration of the values underlying specific constitutional rights. A combination of section 39(2) and section 8 may be called for. In this respect the reference of De Villiers J to section 39(2) in the context of his attempt to apply section 8(3) may be justifiable.¹³⁰ But, the exact function of section 39(2) and the priorities created by the enumeration of specific rights in the Constitution must remain uppermost in such situations. Section 39(2) should be applied exclusively only if there are no specific constitutional rights that are relevant to a dispute,¹³¹ to prevent the type of confusion of principle and right that marked the majority judgment of the Constitutional Court.¹³²

It follows that *Napier* should have been decided as a direct application case in terms of section 8 of the Constitution. This does not mean that public policy could not still have been used as the appropriate vehicle for giving effect to the Constitution in this case,¹³³ but it should have been considered in terms of sections 8(2) and 8(3). Although it has been stated that public policy typically gives effect to indirect application of the Constitution, there is no reason why

¹²⁵ See text next to nn 19-21 above on the two questions asked

¹²⁶ See text next to nn 55-61, 99 above

¹²⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35, although Ngcobo J did not make a very clear connection between his approach and s 39(2). See Woolman 2007 *SALJ* 763

¹²⁸ See 2 2 and the text next to nn 99-101 above

¹²⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 27-28, but see text next to n 101 above

¹³⁰ *Barkhuizen v Napier* TPD 17-09-2004 case no 33129/01 10. This happens quite often: see Woolman "Application" in *Constitutional Law of SA* 31-10, 31-55, 31-77ff and the somewhat strange statement in 31-45 n 1. See also Lubbe 2004 *SALJ* 395. The reference by Ngcobo J to ss 39(2) and 8 in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35 cannot be explained on this basis, as the judge clearly referred to s 8 in the context of indirect application; see text next to n 101 above

¹³¹ Woolman 2007 *SALJ* 776ff is endorsed. In this respect the reference to s 39(2) and 8(3)(b) in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 35 seems perplexing; see text next to n 101 above

¹³² See text next to nn 109-110 above

¹³³ See Van der Walt 2001 *SAJHR* 362 on the important role which public policy can play, although he would regard this type of situation as one of indirect application. In some cases the courts have stated that public policy is rooted or anchored in constitutional values, which suggests that it should be relevant in terms of the indirect application of the Constitution: *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) para 11. A similar impression may be created by *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) para 54 and the reference to German law in n 57. But in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 18, *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 91 and *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 24 it was accepted that public policy was rooted in the Constitution and constitutional values. See also text next to n 147 below

it cannot be the vehicle for developing the law in the case of direct application of the Constitution.¹³⁴

The Constitutional Court's preference for indirect application without properly considering direct application in terms of section 8 probably did not cause too much harm in this case because of the majority's wide interpretation of the sources from which constitutional values could be derived.¹³⁵ Moreover, this would have been the case even if the decision had been handed down by a lower court.¹³⁶ In *Afrox* it was made apparent that lower courts have the same wide scope to give effect to the Constitution in order to develop open-ended norms indirectly as they have when applying the Constitution directly.¹³⁷ Nevertheless, the symbolism of direct application would still have suggested a more forceful approach than indirect application.¹³⁸ It also would have allowed for a more careful balancing of sanctity of contract and the constitutional right to have access to the courts.¹³⁹ Woolman argues that the judgment of Ngcobo J "relies upon a rather baffling conflation of rights analysis, value analysis and public-policy analysis".¹⁴⁰ This of course is true; but the statement should not be read to mean that direct application cannot be done within the context of public policy. It is really the filtering of constitutional rights and public policy through the concept of values which confounds an understanding of Ngcobo J's judgment.¹⁴¹

2 5 Does all public policy derive from the Constitution?

Cameron JA stated that "public policy" now derives from the founding constitutional values".¹⁴² Moseneke DCJ in his minority judgment found that public notions of equity and fairness are now "sourced" from the Constitution.¹⁴³ Ngcobo J held that the determination of the concept public policy was once fraught with difficulties, but that is no longer true, and that public policy now has to be determined by reference to the values that underlie our constitutional democracy as it receives expression in the Bill of Rights. He further stated that public policy is now "evidenced" by these constitutional values.¹⁴⁴

These judges suggest that in all cases public policy should be derived from the Constitution. Ngcobo J justified his conclusion on the basis that public policy represents the legal convictions of the community,¹⁴⁵ the Constitution itself makes it clear that our society is founded on the values set out in the

¹³⁴ See text next to n 160 below on the nature of public policy

¹³⁵ See text next to n 104 above

¹³⁶ As proposed by Woolman 2007 *SALJ* 779-781

¹³⁷ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA)

¹³⁸ See text next to nn 98, 118-122 above

¹³⁹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) paras 25-35

¹⁴⁰ Woolman 2007 *SALJ* 772, 779

¹⁴¹ See the criticism in the text next to nn 109-110 above

¹⁴² *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 7

¹⁴³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 104

¹⁴⁴ Paras 28-30

¹⁴⁵ Para 28 See para 73 where reference was made to the legal synonym "boni mores" See also para 117 per Moseneke DCJ and paras 140, 141, 146, 175, 176, 177 per Sachs J

Constitution and that the Bill of Rights is the cornerstone of our democracy.¹⁴⁶ But these arguments do not justify the conclusion that the Constitution should be the *only* source of public policy.

Ngcobo J also made the weaker statement that public policy is “rooted” in the Constitution.¹⁴⁷ He further accepted that public policy is informed by the necessity to do simple justice between man and man,¹⁴⁸ notions of fairness and justice as well as *ubuntu*.¹⁴⁹ He stated, with reference to cases that concerned the law of delict,¹⁵⁰ that:

“Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled “is the general sense of justice of the community, the boni mores, manifested in public opinion”.¹⁵¹

No reference was made to the Constitution in coming to these conclusions.

Sachs J was more cautious. When it comes to the relationship between public policy and the Constitution he merely referred to “public policy in our new constitutional dispensation”,¹⁵² “considerations of public policy in our constitutional era”,¹⁵³ “public policy propelled by the letter and spirit of the Constitution”,¹⁵⁴ and public policy as “animated”,¹⁵⁵ or “infused”,¹⁵⁶ by the Constitution or constitutional values.¹⁵⁷

These statements appear to be more balanced and realistic. So the Constitution clearly will be an important determinant of public policy. Public policy will be rooted in the Constitution. The clear text of the Constitution will assist courts in determining public policy. But public policy also embraces more than the Constitution and constitutional values. It will remain very difficult to determine what public policy is in a specific case, partly because it embraces more than just the Constitution and partly because constitutional values are often vague and conflicting.

¹⁴⁶ Para 28

¹⁴⁷ Para 28 This terminology is also used in most of the cases to which Ngcobo J refers: *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 18; *Brisley v Drotosky* 2002 4 SA 1 (SCA) para 91 See also the cautious approach in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) paras 54-56 See further *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) para 11 where it was mentioned that public policy was grounded in the Constitution, and *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 24 where the court stated that public policy was anchored in the Constitution See Lubbe 2004 *SALJ* 399-400, 402 where the writer speaks of the “Constitution and of other underlying principles” See also text next to n 133 above

¹⁴⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51 with reference to *Jajbhay v Cassim* 1939 AD 537 544; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 23; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9F-G

¹⁴⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 51, 52 See text next to n 188 below

¹⁵⁰ *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc v OK Hyperama Ltd and Others; Lorimar Productions Inc v Dallas Restaurant* 1981 3 SA 1129 (T) 1152-1153; *Schultz v Butt* 1986 3 SA 667 (A) 679B-E

¹⁵¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 73

¹⁵² Para 183

¹⁵³ Para 123

¹⁵⁴ Para 150

¹⁵⁵ Paras 157, 185

¹⁵⁶ Para 177

¹⁵⁷ Contrast this with the rigid approach followed by the majority and Supreme Court of Appeal

If public policy is more than an expression of constitutional rights and values, it may be contended that it is inappropriate to mediate the Constitution's application to contracts through public policy. It may water down constitutional rights and bring them down to the level of ordinary rights and values. However, this result can be avoided by prioritizing different values under the rubric of public policy. All principles of public policy ought not to be, and have never been, treated equally. As long as there is a conscious process of prioritizing, there is no reason why courts cannot give effect to the constitutional importance of certain rights and values, even if they impact on contracts through public policy.¹⁵⁸

The root cause of most of the problems regarding the role of public policy in the application of the Constitution lies in confusion about its nature. Ngcobo J's reference to the legal convictions of the community seems problematic, as previous Supreme Court of Appeal judgments have been highly critical of this terminology in the context of contracts.¹⁵⁹ Moreover, the statements quoted above regarding the nature of public policy stretch over a very wide range. At times it is suggested that public policy merely represents public opinion. If this were true, it would indeed be inappropriate to apply the Constitution through public policy. Yet it represents an over-simplified view of public policy. Public policy is not, or at least is not necessarily, a factual issue. It is a collection of general principles and more specific rules of contract law that are aimed at protecting the public and broader interest and values of society that is at most sensitive to public opinion.¹⁶⁰

3 The application of section 34 to contracts

The right to have disputes resolved by a court is guaranteed in section 34 of the Constitution. Cameron JA did not make any direct reference to section 34 when he answered his first question regarding the extent to which the Bill of Rights applied to the contracting parties.¹⁶¹ He asked, in a separate section, whether the time limitation could be impugned for being inconsistent with section 34. He decided that the section could not be applied in this manner, as it did not deprive the insured of any pre-existing right. From the outset the right to claim indemnification was subject to a time limitation. The cases on which the insured relied when challenging the time limitation on the basis of section 34¹⁶² concerned statutory provisions that restricted access to the courts of the holders of pre-existing rights. They constituted statutory restric-

¹⁵⁸ See also text next to nn 102-110 above

¹⁵⁹ *Brisley v Drotosky* 2002 4 SA 1 (SCA) paras 22, 93

¹⁶⁰ Van der Merwe et al *Contract* 192-194. Lubbe 2004 *SALJ* 399 describes public policy as a "black-letter" concept "which, along with more precisely delineated concepts and rules, [constitutes a component] of legal doctrine". However, see his more cautious approach and especially his more restrictive use of the term "black letter", although it is also important not to remove the elasticity of the concept 403-405, 417

¹⁶¹ See text next to n 61 above. Compare the application of s 27(1)(a) of the Constitution in *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) paras 14-31 and see the comments of Lubbe 2004 *SALJ* 399, 413-414

¹⁶² *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC); *Moise v Greater Germiston Transitional Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 4 SA 491 (CC)

tions on delictual rights. In this case a contractual right was limited in the contract which granted the right.¹⁶³ The judge observed that:

"This is not to sanctify contract. It is to recognize that rights differ in their nature and how they originate, and consequently in how they are enforced and protected. The question whether statutory abridgement of access to court to enforce an existing right is justifiable cannot be equated with the question whether an apparently freely concluded contractual term is constitutionally suspect".¹⁶⁴

It is not quite clear to what extent the judge thought all these issues – the nature and origin of the right, the nature and origin of the restriction and whether the right already existed when it was restricted – determined the application of section 34. It would make sense if, on his argument, section 34 was excluded only where a contractual right is created subject to a contractual time limitation.¹⁶⁵ Other matters should not be conclusive. Section 34 should apply where a contractual right is restricted by statute, where a statutory right is created subject to restrictions, a statutory right is later restricted by statute, or where a pre-existing right that was not contractual is restricted contractually.

However, Ngcobo J in the Constitutional Court called Cameron JA's understanding of section 34 "narrow and formalistic".¹⁶⁶ Although he found that section 34 could not be applied directly to the contract, he correctly felt the need to answer Cameron JA's contention, because he gave effect to section 34 in the context of public policy.¹⁶⁷ He found that Cameron JA did not take sufficient account of the fact that the courts have traditionally opposed contractual provisions that prevent the parties to a contract from having their disputes referred to a court of law¹⁶⁸ and that the Constitution now bolsters this approach.¹⁶⁹

Nevertheless, Ngcobo J did not regard the basic distinction between contractual and statutory restrictions as irrelevant. A conceptual difference exists

"... between a statute that introduces a limitation on the period within which a pre-existing right may be prosecuted and a contract that establishes rights and time periods within which those rights must be prosecuted".¹⁷⁰

¹⁶³ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) paras 17-27

¹⁶⁴ Para 24

¹⁶⁵ Bhana 2007 *SALJ* 272 observes that it is unlikely that the court also thought that s 34 would not apply to contractual restrictions of pre-existing rights. The constitutional provision has already been applied in the contractual cases of *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) and *SA Bank of Athens Ltd v Van Zyl* 2005 5 SA 93 (SCA). It also may be asked whether the court would have followed a similar approach if it found that the parties were in an unequal bargaining position (see Bhana 2007 *SALJ* 279).

¹⁶⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 54. See also Bhana 2007 *SALJ* 279, whose argument supporting this point is not entirely convincing. She further argues that the courts have in the past struck down restrictions on contractually created rights and mentions the striking down of certificates of balance in cases such as *Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd* 1995 3 SA 1 (A) as an example. This proposition is more convincing.

¹⁶⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) 54. Moseneke DCJ (para 108) and Sachs J (para 181 read with 185) accepted without much comment that s 34 applied through public policy. Langa CJ (para 186) made a similar point, although he cautioned that s 34 would not necessarily have to operate through public policy.

¹⁶⁸ See, for example, *Nino Bonino v De Lange* 1906 TS 120 123-124.

¹⁶⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 54.

¹⁷⁰ Para 55. See in a different context the influential arguments of Scott "Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds" 2002 *THRHR* 656, especially 657-659 and the reference in *Bock v Duburoro Investments (Pty) Ltd* 2004 2 SA 242 (SCA) para 15.

The mere fact that a contractual provision does not restrict the operation of a pre-existing right is not a trump card. It will not mean that section 34 should no longer have any application in the situation. But in evaluating the acceptability of a time-limitation provision, this fact should be considered in conjunction with others.¹⁷¹ The distinction drawn by the Supreme Court of Appeal has two dimensions. A contract is normally not unilaterally imposed in the same sense as a statutory provision. This should itself play a role in determining whether a time limitation is consistent with section 34.¹⁷² Moreover, a distinction can be drawn between the contractual restriction of a pre-existing right and the creation of a restricted right. A contractual time-limitation that restricts a pre-existing right to bring a claim, irrespective of how that right is created, will conceivably be treated differently to a time-limitation that determines the limits of a right on its creation in the contract. This will be so, even if both limitations are created with the same amount of volition.

Ngcobo J evaluated the effect of section 34 against the backdrop of the requirement that a contract must not be against public policy. He carefully considered the import of this provision.¹⁷³ It is fundamental to the stability of our constitutional order. It requires a fair resolution of disputes.¹⁷⁴ However, the right is itself subject to limitation. Access to courts is often restricted in contracts or in legislation. There may be sound pragmatic reasons for restricting access. Delays in bringing claims protract disputes about rights and obligations. They make it difficult to adjudicate satisfactorily on disputes as witnesses may no longer be available and the memories of those who are available may have faded. Accordingly, time-limitation clauses should be tolerated as long as they do not impinge on reasonable or fair access to the courts. The Constitution did not create an absolute right in section 34. Where section 34 is applied directly it will be subject to the limitations clause in section 36. The reasonable limitation of section 34 in the context of public policy would also “reflect public policy”.¹⁷⁵

Ngcobo J therefore decided that the test put forward in the *Mohlomi* case,¹⁷⁶ in the context of a statutory restriction that affected access to the court to enforce a delictual right, could also be applied in determining whether a contractual time-limitation on a contractual right was contrary to public policy. It had to be determined whether the holder of a right had “an initial opportunity to exercise the right that amounts, in all the circumstances ... to a real and fair one”.¹⁷⁷ Time limitations should not be judged according to hard and fast rules.¹⁷⁸

¹⁷¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 55

¹⁷² A contractual provision should be treated more strictly and more like a statutory provision, the smaller the element of volition involved. See *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 176, 180 and 6 2 3 below on the role of bargaining power and the approach of Sachs J

¹⁷³ See also the minority judgment of Sachs J para 143

¹⁷⁴ Paras 31-34

¹⁷⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 46-48

¹⁷⁶ Paras 50-52 with reference to *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) para 12. See also *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 109 per Moseneke DCJ and the analysis in 6 2 below

¹⁷⁷ *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) para 12

¹⁷⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 50-51

4 Public policy, section 34 and the general determination of fairness or reasonableness in the light of the Constitution

The *exceptio doli generalis* has been discarded from South African law and the requirement that contracting parties must act in good faith in their contractual relationship has been applied restrictively by South African courts.¹⁷⁹ By the same token, public policy has gained prominence as a device for achieving fairness in the law of contract. Courts have accepted that unconscionable, unduly harsh or oppressive contractual provisions could be struck down for being against public policy.¹⁸⁰

In evaluating public policy, Cameron JA in the Supreme Court of Appeal first considered whether the limitation was unfair, with reference to the foundational constitutional principles of dignity, equality and the advancements of human rights and freedoms.¹⁸¹ This approach followed from the narrow role which he ascribed to section 34 and his restrictive view of the manner in which the Constitution impacts on public policy. Moreover, he did not regard proof of unfairness as sufficient. These three aspects have not survived scrutiny. The Constitutional Court gave wide sway to section 34, did not regard broader foundational values underlying the Constitution as the only determinant of public policy and emphasized the role of unfairness as such.¹⁸² Hence, it is difficult to draw broad conclusions from this part of Cameron JA's judgment. However, the contention that the Constitution bolsters an attack on an unfair contract term, even without reference to a specific constitutional right such as section 34, is correct.

A contractual provision which gives a contracting party a right that will expire after a very short time clearly also effectively deprives him of a fair

¹⁷⁹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A); *Brisley v Drotosky* 2002 4 SA 1 (SCA); Christie *The Law of Contract in South Africa* 5th ed (2006) 12-13, 15, 16-17; Hawthorne "Closing the Open Norms in the Law of Contract" 2004 *THRHR* 294, 300-301; Lubbe 2004 *SALJ* 397-398; Pretorius 2003 *THRHR* 643-644; Van der Merwe et al *Contract* 317-324. See the further discussion of bona fides in the text next to nn 222, 355-356, 365 below. On the possible role of the *exceptio doli generalis* after the Napier matter, see Glover "Lazarus in the Constitutional Court: an exhumation of the Exceptio Doli Generalis" 2007 *SALJ* 449.

¹⁸⁰ Christie *The Law of Contract* (2006) 16-18, 343ff; Van der Merwe et al *Contract* 218-220. Some of the major cases are: *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 8; *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) 782-783; *Brisley v Drotosky* 2002 4 SA 1 (SCA) para 32 where the court referred to "buitengewone onbillikheid" ("extraordinary unfairness"); *Diners Club SA (Pty) Ltd v Singh* 2004 3 SA 630 (D) 658; *National Bank of SA Ltd v Bophuthatswana Consumer Affairs Council* 1995 2 SA 853 (BG) 871; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) para 24; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 14. In *First National Bank of SA Ltd v Sphinx Fashions CC* 1993 2 SA 721 (W) 725 the court relied on *Sasfin* and stressed that the inequity of a situation was apparent and that it was grossly exploitative. In *Bafana Finance Mabopane v Makwakwa* 2006 4 SA 581 (SCA) para 21 the court found that a provision was offensive to one's sense of justice and in *Standard Bank of SA Ltd v Essop* 1997 4 SA 569 (D) 575-576 the court spoke of unconscionability and a complete lack of elementary justice. See the minority judgment in *Brunner v Gorfil Brothers Investments (Pty) Ltd* 1999 2 SA 389 (SCA) 420. See further 6 below. See also Hawthorne 2004 *THRHR* 294 on the state of public policy after the *Afrox* case; Lubbe 2004 *SALJ* 398, 401, 412, 417; Naude & Lubbe "Exemption clauses – a rethink occasioned by *Afrox Healthcare Bpk v Strydom*" 2005 *SALJ* 441, 442. See also Pretorius 2003 *THRHR* 642 where it is stated that courts will only apply this doctrine in aberrational instances and that courts restrict its operation. See also the comparison of Bhana 2007 *SALJ* 275 of this approach with the one followed by Cameron JA in *Napier* (n 206 below).

¹⁸¹ *Napier v Barhuizen* 2006 (4) SA 1 (SCA) paras 6-16.

¹⁸² See 3 above on the wide reading of s 34, 2 3 above on the broader approach to public policy, and text next to fn 148 on the enhanced importance of fairness.

opportunity to enforce it. Insurance contracts also typically determine that an insured must give notice of a loss within a specific time of that loss coming to his knowledge.¹⁸³ If this period is short, say 24 hours, could it not be argued that the insured is deprived of his right to claim indemnification in court? The answer seems to be no. The notice requirement in *Napier* was related more closely to the bringing of court proceedings. Similarly, such a notice provision is different from the statutory provision set out in section 113 of the Defence Act 44 of 1957 which was struck down in the *Mohlomi* case¹⁸⁴ for being inconsistent with section 34 of the Constitution. That provision determined that:

“No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.”

The notice requirement in terms of the statute also was related more closely to civil action. Access rights in terms of section 34 will come into play only where a contractual provision is closely related to court access. (In this sense the typical short-term insurance provision stating that an insured will only pay a claim within one year of loss suffered by the insured, unless the claim is the subject of legal proceedings at the end of the period, is more likely also to be subject to scrutiny in terms of section 34¹⁸⁵). However, such a provision can still be inconsistent with public policy on the basis that it is generally unconscionable, even if not specifically inconsistent with section 34.

Indeed, the right of access to the courts, unlike the right to be fairly treated in contracts in the more general sense, is specifically guaranteed in the Constitution. This suggests that it should receive special attention. Some distinction therefore has to be drawn between cases that concern unreasonable limits to court access and other unreasonable provisions. One of the strengths of the minority judgment of Sachs J is that he did so throughout.¹⁸⁶ In this sense the attempt of the Supreme Court of Appeal to draw a line and to evaluate the time limitation against a general reasonableness standard is understandable. Nevertheless, it is suggested that the rigid bright line cannot be drawn in the form and at the place suggested by the Supreme Court of Appeal.¹⁸⁷

Conversely, the question whether a provision is fair or reasonable in the more general sense, and whether it gives a person a fair or reasonable opportunity to have access to a court with regard to a specific right, are closely related. This broader link should not be ignored. Ngcobo J's judgment should

¹⁸³ Reinecke et al *General Principles of Insurance Law* para 317. See especially Burochowitz J in *Napier NO v Van Schalkwyk* 2004 3 SA 425 (W) and the proposed solutions to the problem. Perhaps enforcement of these types of provisions should depend on whether the insurer suffers prejudice. See also the comment about public policy by Farber J in the same case (435).

¹⁸⁴ *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC).

¹⁸⁵ *K & S Dry Cleaning Equipment (Pty) Ltd v SA Eagle Insurance Co Ltd* 2001 3 SA 652 (W); *Kgaka v Statute Insurance Co Ltd* 2001 4 SA 245 (T); *Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa Ltd* 2004 5 SA 520 (SCA); *Union National South British Insurance Co Ltd v Padayachee* 1985 1 SA 551 (A).

¹⁸⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 123, 143, 150, 181, 183, 185. See 6 2 4 below.

¹⁸⁷ See 3 above.

not be read as concerning only the section 34 right of access to the courts, but also the role of reasonableness and fairness as a general informing principle of public policy:

“Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account simple justice between individuals. Public policy is informed by the concept of *ubuntu*.”¹⁸⁸

The requirement that a time limitation has to give a fair opportunity to seek judicial redress to a contracting party was viewed as being “consistent with the notions of fairness and justice which inform public policy”.¹⁸⁹ In terms of public policy, fair access to the courts is therefore viewed as a specific manifestation of a broader concept of fairness. The conclusion that an unfair contractual provision could be against public policy as informed by the Constitution therefore extended beyond provisions that restrict access to the courts.¹⁹⁰

A similar approach was followed in the minority judgments. Moseneke DCJ noted that it had to be determined whether the contractual term is so unreasonable that it offends public policy. “In the context of this case” the question was whether it unreasonably restricted the right to seek judicial redress.¹⁹¹ Sachs J ultimately left open the question whether all oppressive standard-form contractual terms will be offensive to public policy. He found only that the oppressive time limitation before him was inconsistent with public policy because it concerned the constitutionally protected right of access to the courts.¹⁹² Yet, almost his entire judgment was dedicated to an analysis of standard-form contracts and the extent to which oppressive provisions in these contracts will be contrary to public policy. He established a clear link between time limitations, unfair terms in standard-form contracts and unfair terms more generally.¹⁹³

[To be continued in 2009 (1) *Stellenbosch Law Review*]

SUMMARY

Barkhuizen v Napier 2007 5 SA 323 (CC) has important implications for insurance law, contract law in general, and an understanding of the interface between private common law and the Bill of Rights. In this matter an insurance policy determined that a claim against the insurer would lapse if the insured failed to serve summons on the insurer within 90 days of being notified of the insurer’s repudiation of the claim. The insured argued that this provision conflicted with the constitutional right of access to the courts set out in section 34 of the Bill of Rights

The majority of the Constitutional Court, per Ngcobo J, considered the application of the Constitution of the Republic of South Africa, 1996 in private relationships. He eschewed direct application of the Bill of Rights to the contractual provision, but preferred to apply it indirectly via the contract law concept of public policy. He considered the meaning of this form of public policy in the light of the Constitution, determined the manner in which the section 34 right as an expression of

¹⁸⁸ Para 51 See again the reference to “simple justice between the contracting parties” in para 73 and the reference to “simple justice between person and person” per Sachs J in para 159 See also text next to n 149 above

¹⁸⁹ Para 52

¹⁹⁰ For a similar approach to enforcement, see paras 70, 73

¹⁹¹ Para 96

¹⁹² Para 185

¹⁹³ Paras 158-161, especially paras 161, 174, 175

public policy applied to this contract and related this to broader contractual fairness. Part I of this article focuses on these aspects.

The majority further considered the significance of the sanctity of contract under the Constitution and decided that it could only uphold the time-limitation clause if it was fair. Its test for determining fairness was derived from cases that determined whether statutory provisions were inconsistent with section 34. The majority upheld the clause on the basis that there was insufficient evidence to show that the provision was unreasonable or that it would be unreasonable to enforce it in the circumstances. Part II, which is to be published in 2009 (1) *Stellenbosch Law Review*, is dedicated to an analysis of these issues.

The majority judgment is analyzed with reference to the trenchant criticism in the minority judgments of Sachs J and Moseneke DCJ, delivered in the same court, as well as the earlier judgments of the Transvaal Provincial Decision and Supreme Court of Appeal. Ultimately the majority judgment in the Constitutional Court is criticized for being too timid and in some respects unsystematic. However, the final conclusion is positive. These judgments can serve as a springboard for the development of a progressive contract law, built on the values and rights set out in the Constitution.